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School Board of Nassau County v. Arline: An Extension within Manageable Bounds Protecting the Handicapped

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SCHOOL BOARD OF NASSAU COUNTY V. ARLINE: AN EXTENSION WITHIN MANAGEABLE BOUNDS PROTECTING THE HANDICAPPED

I. INTRODUCTION

> [T]o protect them, not only as equals before the law, but also in their health, their homes, their firesides, their liberties as men, as workers, and as citizens; to overcome and conquer prejudices and antagonism; to secure to them the right to life, and the opportunity to maintain that life. . . .[1]

The handicapped of America have faced discrimination in a variety of settings, such as access to public buildings and transportation, housing, and employment.. In 1973, Congress enacted legislation to assist these individuals in overcoming the numerous obstacles that have limited their potential contribution to society. The Rehabilitation Act[2] created a means of prohibiting discrimination against the handicapped in federally funded activities and programs. The broad language of the Act encompasses the wide range of disabilities and situations where discrimination exists in our society.

In *School Board of Nassau County v. Arline*,[3] the Supreme Court addressed the questions of whether a person with contagious tuberculosis is a "handicapped person" under the Act and, if so, whether that person is "otherwise qualified" to teach elementary school.[4] This Comment focuses on the history and facts leading up to this decision, and examines its effect and application to future disputes involving communicable diseases. Part II discusses communicable diseases and develops the background of the Rehabilitation Act of 1973, focusing on section 504 and case law. Part III discusses *School Board of Nassau County v. Arline*. Part IV analyzes specific aspects and applications of the Court's holding in *Arline*, taking the view that the decision was proper and just, and that the result does not make unmanageable the handling of communicable diseases addressed under section 504 of the Act.

II. BACKGROUND

A. *Communicable Diseases*

Case law involving the Rehabilitation Act has been extensive. Yet, prior to the Supreme Court's decision in *School Board of Nassau County v. Arline*, communicable disease as a handicap under this legislation had

1. Speech by S. Gompers (1898).

2. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-94 (1982)) [hereinafter the "Act" or "Rehabilitation Act"].

3. 408 So. 2d 706 (Fla. Dist. Ct. App. 1982), *rev'd*, 772 F.2d 759 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1123, *reh'g denied*, 107 S. Ct. 1913 (1987).

4. 107 S. Ct. at 1125.

never been squarely addressed. This section of the Comment will discuss communicable diseases, more specifically tuberculosis, and the limited amount of legislation directed at the control of these communicable diseases.

1. Overview

The term "communicable disease" is identified with a variety of afflictions, encompassing a myriad of symptoms and numerous means of transmission. "Communicable," "infectious," and "contagious" have each been used to describe a type of condition which can be transferred from one organism to another. "Infectious" refers to the communication of a condition due to the action of a microorganism that is transferred with or without contact. "Contagious," though, describes disease that is passed by contact and, as such, is easily transmitted.[5] Disorders such as the common cold, chicken pox, and measles, as well as leprosy, plague, gonorrhea and acquired immune deficiency syndrome ("AIDS"), are just a few examples of the over 200 identified infectious diseases that are contracted by millions of people annually.[6]

Some of the microorganisms that cause communicable diseases are viruses, bacteria, and fungi.[7] Since each microorganism differs in form, there is a variance in the mode each is transmitted. Most common is the passing of disease directly from human to human by coughing, sneezing, touching, biting, kissing, or sexual intercourse. The disease may also be transferred indirectly through a contaminated source, such as utensils, fabrics, or blood transfusions. Animal bites or insect stings are still a third medium of transmission, involving animal to human contact.[8]

The symptoms associated with each disease vary, as do the risks of transmission. Upon identification of a communicable disease, the knowledge of the mode of such transfer allows public health officials to reasonably isolate the type of transmission and to take measures to control it.[9] The division of these diseases by the American Public Health

5. STEDMAN'S MEDICAL DICTIONARY 315, 707 (5th laywers' ed. 1982). "Communicable" or "infectious" can also refer to diseases that are capable of transfer, but may not be so currently, though all three terms may denote a present ability to pass the disease to others. Brief for American Medical Association as Amicus Curiae at 2, n.2, School Bd. of Nassau County v. Arline, 107 S. Ct. 1123 (1987) (citation omitted).

6. 35 MORBIDITY AND MORTALITY WEEKLY REPORT 782 (Jan. 3, 1986).

7. HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 455-56 (11th ed. 1987).

8. CONTROL OF COMMUNICABLE DISEASES IN MAN 457-58 (A. Benenson 14th ed. 1985).

9. Prior to general medical acceptance of communicability of diseases, it was commonly held that human contact was the sole perpetrator of transmission. Control of such disease was thought to consist of quarantine and isolation. Upon acceptance of microorganisms as the cause of infection, emphasis has moved toward education of the public and research into and treatment with vaccines and drugs. Brief of the State of California as Amicus Curiae at 5, *Arline*, 107 S. Ct. 1123 (1987) (citing C. WINSLOW, THE CONQUEST OF EPIDEMIC DISEASE 181-83, 309-10, 364-76 (1943); P. WEHRLE & F. TOP, COMMUNICABLE AND INFECTIOUS DISEASES 19-27, 29 (9th ed. 1981)). For a discussion on controlling communicable diseases through vaccination, see Morgenstern, *The Role of the Federal Government In Protecting Citizens From Communicable Diseases*, 47 U. CIN. L. REV. 537 (1978) (concerning the swine flu virus "epidemic"). The author wishes to express his neutrality as to the

Association assists the officials by establishing notice standards for each class and subclass based on necessity of action.[10]

2. Legislation

Statutes relating to communicable diseases are of generally two types—reporting and isolation. The former only requires cases of infectious diseases to be reported to public health officials, but does not deny the afflicted any rights or liberties. The latter is used to protect the public by isolating the disease carrier, either generally during periods of communicability, or in specific situations and activities.[11] When extreme measures—such as capture and detention—are used, which infringe on the rights of an individual, the action must be substantiated by a compelling governmental interest, based on case-by-case evaluations by local health authorities.

Federal legislation generally concerns isolation,[12] while the matters of reporting, records, and quarantine are overseen by the individual states. Federal regulations are limited in scope to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States or from one state into another.[13] The section only allows for quarantine and inspection, based upon recommendations made by the National Advisory Health Council and the Surgeon General, as specified by executive orders of the President.[14] A reasonable belief that an individual is infected with a communicable disease, and will be moving from one state to another state, or will be the source of infecting others who will be moving, is required for apprehension and examination.[15] The Secretary of Health is authorized to develop, organize and plan the means for prevention of communicable diseases, and to oversee the coordination of federal-state and interstate interests relating to the diseases.[16]

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actions taken to suppress the spread of communicable diseases in the manners previously stated in this footnote. It is intended only to represent a guide to research in one philosophy of such treatments.

10. Brief for American Medical Association as Amicus Curiae at 3, *Arline*, 107 S. Ct. 1123 (1987). Diseases are divided into five classes, each with many subclasses, and are based on need for investigation and control. For example, tuberculosis is a Class 2B disease, and cases of such must be reported to local health authorities, to be weekly forwarded by mail to higher health authorities. *Id.* at 4. Generally, these reporting practices, and not the relative contagiousness of the diseases, are the traditional bases for the classifications.

11. Joint Appendix at 59, *Arline*, 107 S. Ct. 1123 (1987).

12. *See* 42 U.S.C. § 264 (1982). The regulation generally allows for apprehension, detention, examination, and conditional release of those qualifying under section 264(d). *See also* 42 U.S.C. § 243 (1982) (federal-state cooperation in control of communicable disease).

13. 42 U.S.C. § 264(a).

14. 42 U.S.C. § 264(b). An Executive Order by President Reagan specified the communicable diseases included under section 264(b) as "Cholera or suspected Cholera, Diphtheria, infectious Tuberculosis, Plague, suspected Smallpox, Yellow Fever, and suspected Viral Hemorrhagic Fevers (Lassa, Marburg, Ebola, Congo-Crimean, and others not yet isolated or named)." Exec. Order No. 12,452, 48 Fed. Reg. 56,927 (1983).

15. 42 U.S.C. § 264(d).

16. Some federal legislation has been aimed specifically towards cooperation between

Certain state legislation, in addition to laws on reporting their condition, relates to the exclusion or isolation of infectious individuals. The laws of Florida present a general overview of the state statutes governing communicable disease. Most states have legislation which confers general duties and powers to the state or local department of health. Under Florida's general statutory provisions outlining these duties and powers, the Department of Health and Rehabilitative Services of Florida (the "Department of Health") is given the duty of supervision and enforcement of the laws, rules, and regulations relating to communicable disease, and is required to cooperate with the appropriate federal officials, and municipal and county officials and employees, in the enforcement, prevention, and suppression of these diseases.[17] In addition to these duties, the Department of Health provides thorough investigations, studies, and dissemination of information to the public on the occurrence, cause, and mode of transmission, as well as the means of prevention and control of communicable disease.[18] It also assumes control and management upon determination that the disease is "contagious or infectious and a menace to public health."[19]

Florida state laws for tuberculosis are quite similar to those laws that generally cover communicable diseases. Such laws require that the infected person have "active tuberculosis and [be] dangerous to the public health,"[20] and upon investigation and determination of such, that the Department of Health assume charge and management of the case, incurring all necessary and legitimate expenses.[21] Additionally, besides those laws found in Florida, many states have statutes which authorize the exclusion of students[22] or teachers[23] from the classroom based on

federal, state, and local authorities to assist in the enforcement of quarantine regulations, and the corresponding planning and training involved with it. *See* 42 U.S.C. § 243 (1982).

17. *See* FLA. STAT. § 381.031(1)(a)-(d) (1986); FLA. STAT. § 381061(2) (1986).

18. FLA. STAT. § 381.031(1)(e) & (f) (1986).

19. FLA. STAT. § 381.351 (1986). The control of communicable disease is also covered under FLA. STAT. § 384, which refers to venereal diseases. The Department of Health and Rehabilitative Services is again the agent in charge of reporting, investigation, and treatment. Section 384.24 makes it unlawful for any person infected with a venereal disease, with knowledge of such, to communicate the disease to any other person through sexual intercourse unless such other person has been informed of the presence of the disease.

Under the list of included diseases is human T-lymphotropic virus type III (HTLV-III) infection, the virus associated with Acquired Immune Deficiency Syndrome (AIDS), and AIDS-Related Complex (ARC). The reporting of cases of HTLV-III infection are limited to physician diagnosed cases of AIDS and ARC, based upon diagnostic criteria from the Centers for Disease Control of the United States Public Health Service. FLA. STAT. § 384.25(2) (1986). *See infra* note 247 for a discussion of AIDS and ARC.

20. FLA. STAT. ANN. §§ 392.25 & 392.26 (West 1986). The Department of Health and Rehabilitative Services investigates any "suspicious" cases of disease and determines if the condition is contagious or infectious. FLA. STAT. § 381.351 (1986).

21. FLA. STAT. § 381.351 (1986).

22. *See* ALASKA STAT. § 14.30.045(41) (1987) (general welfare); WISC. STAT. ANN. §§ 143.12 & 143.06 (West 1974) (communicable disease and tuberculosis, respectively).

23. *See* ARIZ. REV. STAT. ANN. § 15-505(b) (1984) ("continuing" teachers suffering from pulmonary tuberculosis requesting a leave of absence shall be granted such); ILL. REV. STAT. ch. 122 §§ 24-25 (1986); MASS. ANN. LAWS ch. 71, § 55B (Law. Co-op. 1986); MINN. STAT. ANN. § 125.17 subd. 4(4) (West 1979); N.J. STAT. ANN. § 18A:40-10 (West 1968); N.Y. EDUC. LAW § 913 (McKinney 1986); VA. CODE ANN. § 22.1-300 (1985).

general or specific conditions.

B. *Legislative History of the Rehabilitation Act and Title V*

The Rehabilitation Act of 1973 (the "Act") was enacted "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living" for the nation's handicapped.[24] It provides the basis for the Rehabilitation Services Administration to authorize federal programs[25] for assisting this class in overcoming discrimination in a variety of settings, while promoting their standing as self-supporting members of the community. Congress intended for the Rehabilitation Act "to the maximum extent possible . . . fully integrat[e]" the handicapped "into the mainstream of life."[26] Additionally, Senator Taft, in reference to section 504 of the Act, expressed some of the motivations for this anti-discrimination legislation:

> Too many handicapped Americans are not served at all, too many lack jobs, and too many are underemployed—utilized in capacities well below the levels of their training, education, and ability. . . . [I]f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward elimination of the most disgraceful barrier of all—discrimination.[27]

When the Act was passed, Congress estimated that seven million Americans would benefit from this legislation[28] which would effect roughly one-half of all businesses.[29] These numbers alone demonstrate that the assistance afforded to handicapped individuals has as much an effect on America in general as it does on the handicapped.

The Act bars the federal government,[30] federal contractors,[31] and

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24. 29 U.S.C. § 701 (1982).

25. *Id.* § 702.

26. S. REP. No. 890, 95th Cong., 2d Sess. 39 (1978).

27. Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 172 n.6 (1980) (citing 119 CONG. REC. 24,587 (1973)) [hereinafter *Rehabilitating Section 504*].

28. S. REP. No. 318, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2091.

29. Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2043 (noted in Wolff, *Protecting the Disabled Minority: Rights and Remedies Under Sections 503 and 504 of the Rehabilitation Act of 1973*, 22 ST. LOUIS U.L.J. 25, 26 & n.9 (1978)).

30. Rehabilitation Act § 501(b), 29 U.S.C. § 791(b) (1982).

31. Rehabilitation Act § 503 reads in part:

> (a) [A]ny contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. . . .

29 U.S.C. § 793(a) (1982). The section also applies to any subcontracts in excess of $2,500 under the same terms as above, *id.*, and provides the applicable filing and investiga-

employers who receive federal funds[32] from discriminating against a handicapped individual solely on the basis of that handicap.[33] Section 504 of the Act prohibits such discrimination in *any* federally funded activity or program.[34] This prohibition is consequently broad, since the Act does not direct its coverage at discrimination in any specific area; yet, its legislative history points to such a conclusion.[35]

The Act was first introduced[36] as an amendment to the Civil Rights Act of 1964.[37] In fact, section 504 is based on the anti-discrimination language of section 601[38] of the Civil Rights Act.[39] Since legislation

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tion information for complaints relative to failure to comply with the affirmative action provisions. 29 U.S.C. § 793(b). *See infra* note 43 for section 706(7).

32. Rehabilitation Act § 504, 29 U.S.C. § 794 (1982). *See infra* notes 63-73 and accompanying text (judicial interpretation of what federal financial assistance is required for a cause of action under the Act).

33. *See infra* notes 93-151 and accompanying text.

34. Rehabilitation Act § 504 provides:

> "No otherwise qualified handicapped individual in the United States, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."

29 U.S.C. § 794 (1982). The 1978 Amendments to the Rehabilitation Act added:

> or under any program or activity *conducted by any Executive agency or by the United States Postal Service*. The head of each agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. . . .

Id. (emphasis added).

35. Le Strange v. Consolidated Rail Corp., 687 F.2d 767, 773 (3d Cir. 1982) (noting that Senator Cranston, who chaired the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, Senator Javits and Senator Taft, both co-sponsors of the Act, all made comments pointing in the direction of employment discrimination). *See also supra* note 27 and accompanying text (comments by Senator Taft).

36. *See* H.R. 12, 154, 92d Cong., 1st Sess., 117 CONG. REC. 45, 945, 974-75 (1971) (by Representative Charles Vanik of Ohio); S. 3044, 92d Cong., 2d Sess. 118 CONG. REC. 525-26 (1972) (by Senators Hubert Humphrey of Minnesota and Charles Percy of Illinois). For additional legislative history on the Rehabilitation Act besides that mentioned in other notes, see, e.g., 117 CONG. REC. 45974 (1971); 119 CONG. REC. 24550, 29698, 30148 (1973); 120 CONG. REC. 30531 (1974); 124 CONG. REC. 13885, 30292, 30322-25, 30559, 31590 (1978); H.R. REP. Nos. 928, 1581, 92d Cong., 2d Sess. (1972); H.R. REP. Nos. 42, 244, 500, 93d Cong., 1st Sess. (1973); H.R. REP. No. 1149, 95th Cong., 2d Sess. (1978); S. REP. No. 1135, 92d Cong., 2d Sess. (1972); S. REP. Nos. 48, 391, 93d Cong., 1st Sess. (1973); S. REP. No. 890, 95th Cong., 2d Sess. (1978).

37. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-6 (1982)).

38. 42 U.S.C. § 2000d; section 504 is also similar to Section 901 of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 (1982)).

39. S. REP. No. 1297, 93d Cong., 2d Sess. 39, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6390. Section 601 of the Civil Rights Act states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d to 2000d-6 (1982). For additional legislative history of Section 504 and the Rehabilitation Act, see Alexander v. Choate, 469 U.S. 287, 295-98 (1985); Le Strange v. Consolidated Rail Corp., 687 F.2d 767, 772-76 (3d Cir. 1982); Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376, 1378-82 (11th Cir. 1982); Prewitt v. United States Postal Serv., 662 F.2d 292, 301-04 (5th Cir. 1981) (applicability of the Act to Federal government hiring); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1285 (7th Cir. 1977); Cook and Butler, *Coverage of Employment Discrimination Pursuant to Section 504 of the Rehabilitation Act of 1973*, 19 WAKE FOREST L. REV. 581, 590-99 (1983) [hereinafter *Employment Discrimination*] (includes discus-

addressing both public and private sector discrimination on race, sex, national origin, religion, or age had been in effect for a number of years, the movement to expand protection to include handicapped individuals under section 504 was a logical progression of the law.[40] Further expansion of the Act was needed to limit the application of the legislation within Congress' intended purposes. This was accomplished with amendments in 1974 and 1978, and regulations promulgated by the Department of Health, Education, and Welfare ("HEW").

After passage in 1973, the Act was first amended in 1974[41] to clarify and broaden the coverage of discrimination against the handicapped. Congress intended that section 504 "have as broad a sweep as its language suggests,"[42] and the 1974 Amendments furthered this intent by expanding the term "handicapped individual."[43] Originally interpreted under the 1973 language only in terms of employability, partially due to its relation to vocational rehabilitation services,[44] the expansion in 1974 allowed the definition to be more broadly construed.[45] As seen by the

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sion of post-enactment history); *Rehabilitating Section 504, supra* note 27, at 172-79; Note, *Southeastern Community College v. Davis, Section 504, and Handicapped Rights*, 16 CAL. W.L. REV. 523, 525-30 (1980).

40. Comment, *Employment Discrimination—Analyzing Handicap Discrimination Claims: The Right Tools for the Job*, 62 N.C.L. REV. 535, 535 n.2 [hereinafter *Analyzing Handicap Claims*]. This expansion was logical because the handicapped's protection from discrimination prior to the Rehabilitation Act of 1973 was limited to claims of denial of equal protection under the fourteenth amendment or violation of state anti-discrimination laws amended to include the handicapped. Legislation, including the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, had been in effect for nine and six years, respectively, giving these classes additional protection under federal law. *See id.* This Comment also refers to Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972), as the case which " 'placed in the public eye, for the first time, the notion that the courts could be used to secure constitutional and statutory rights for handicapped persons.' " *Analyzing Handicap Claims*, 62 N.C.L. REV. 535, 535 n.2 (quoting THE LEGAL RIGHTS OF HANDICAPPED PERSONS 52 (R. Burgdorf, Jr. ed. 1980)).

41. The Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1619. Additional amendments included the Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2982, and two minor amendments—the Rehabilitation Act Extension of 1976, Pub. L. No. 94-230, 70 Stat. 211, and the Rehabilitation Amendments of 1984, Pub. L. No. 98-221, 98 Stat. 17. *See infra* notes 54-62 and accompanying text (discussion of the amendments of 1978).

42. *Employment Discrimination, supra* note 39, at 595.

43. Section 706 of the Rehabilitation Act of 1973 originally defined a "handicapped individual" as: "[A]ny individual who (i) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter." In 1974, this definition was expanded to read:

> Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of subchapters IV and V of this chapter, any person *who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment* . . . .

29 U.S.C. § 706(7) (1982) (emphasis added).

44. *Employment Discrimination, supra* note 39, at 594 (citing S. REP. No. 1297, 93d Cong., 2d Sess. 37, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6388 (Senate Committee report discussion on need for change in "handicapped individual" definition)). *See supra* note 43 at (ii) & (iii) (amended portion of "handicapped individual" to deal with this problem).

45. *Employment Discrimination, supra* note 39, at 594 (going beyond the limited employment discrimination interpretation that it had been given).

courts, the 1974 Amendments added clarity to the 1973 Act and direction for interpretation of congressional intent.[46] Yet, the Act, as of these first amendments, had no corresponding procedures or rules for implementation to assist in its interpretation.

Section 504 of the Act contains only references to the definitions found in other parts of the Act and areas where discrimination is prohibited.[47] It designates no guidelines for formulation of rules or regulations to provide federally funded programs with direction under the Act. Since prompt implementation of section 504 was understood as intended by Congress,[48] the President of the United States issued an Executive Order[49] assigning the Secretary of HEW the responsibility to coordinate the rules and regulation procedures to be followed by those federal departments and agencies authorized to extend federal financial assistance.[50] The Secretary was also authorized to establish standards for determining who is a handicapped individual and to formulate guidelines for determining what discriminatory practices are within section 504.[51]

The HEW regulations and rules represented a guide, beyond the language found in the Act itself, for the interpretation and successful implementation of a broad-based employment discrimination program.[52] The authority of the Secretary of the HEW to promulgate these regulations *specifically* enforcing prohibition against employment discrimination has been affirmed by the courts, though at least one decision has given them "diminished deference."[53]

The HEW regulations that were promulgated conformed to the procedures, remedies, and rights under Title VI of the Civil Rights Act,[54] and Congress codified these regulations[55] through additional amendments to assure administrative due process and consistency within the federal government that the Act had lacked.[56] The Rehabili-

46. *Id.* at 595 (citing NAACP v. Medical Center, Inc., 599 F.2d 1247, 1258 n.48 (3d Cir. 1979).

47. *See supra* note 34.

48. Cherry v. Mathews, 419 F. Supp. 922, 924 (D.D.C. 1976) (citing S. REP. No. 1139, 93d Cong., 2d Sess. 24-25 (1974); H.R. REP. No. 1457, 93d Cong., 2d Sess. 27-28 (1974) (Conference report); S. REP. No. 1297, 93d Cong., 2d Sess. 39-40 (1974)).

49. Exec. Order No. 11,914, 3 C.F.R. 117 (1977), *reprinted in* 29 U.S.C. § 794 (1982) (followed by implementation of regulations by Secretary of the Department of Health, Education, and Welfare— now divided into the Department of Education and the Department of Health and Human Services—45 C.F.R. § 84 (1986), which included the complaint and enforcement procedures from Title VI of the Civil Rights Act of 1964); Exec. Order No. 12,250, 3 C.F.R. 298 (1981) gave the Department of Justice responsibility for coordinating federal agency implementation of section 504.

50. 45 C.F.R. § 84 (1986).

51. *Id.* § 84.4; *see also* 29 C.F.R. § 1613.702 (1986) (Equal Employment Opportunity Commission definitions relative to section 504).

52. 45 C.F.R. § 84.11 (for prohibition of discrimination in employment).

53. *See* Southeastern Community College v. Davis, 442 U.S. 397, 412 n.11 (1979).

54. 42 U.S.C. § 2000e-16. *See also* Prewitt v. United States Postal Serv., 662 P.2d 292, 302-03 (5th Cir. 1981) (specific discussion of Section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 717 of the Civil Rights Act, 42 U.S.C. § 2000e-16).

55. 45 C.F.R. § 84.1 (1986).

56. *Le Strange*, 687 F.2d 767, 774 (3d Cir. 1982) (citing SEN. REP. No. 890, 95th Cong.,

tation, Comprehensive Services, and Development Disabilities Amendments of 1978[57] also extended the prohibition of discrimination against any "otherwise qualified" handicapped individual under section 504 to all programs and activities conducted by any executive agency or by the United States Postal Service.[58] These Amendments included the addition of section 505[59] to the Act "to specify the means of enforcing its ban on discrimination."[60] Section 505 (a)(2)[61] specifically applied those enforcements "set forth in Title VI of the Civil Rights Act of 1964" to those qualifying under section 504 of the Rehabilitation Act.[62]

The amendments and promulgated regulations that were added to the Rehabilitation Act since its enactment in 1973 have made the terms and prohibitions of the legislation more concise, and have expanded the opportunities of the handicapped in employment and other fields. For the Act to achieve results in accordance with its aims, broad interpretation by the courts has been necessary. The following section, dealing with the case history of section 504 of the Act, covers the key cases which have dealt with the application of this section, and the Act as a whole, to a variety of situations.

C. *Case History of Section 504 of the Rehabilitation Act*

Judicial interpretation of section 504 has involved many aspects of the title, ranging from the question of a private right of action for aggrieved individuals, to rulings on matters of federal financial assistance and procedural requirements, as well as determinations of whether the plaintiff is "handicapped" and "otherwise qualified." The courts, in dealing with this myriad of issues, has maintained the broad scope of the section's language. This section of the Comment will begin with a brief discussion of a handicapped individual's right to bring a private action under section 504 and the questions involved with the regulations and remedies promulgated by the HEW. It will then focus on the federal

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2d Sess. 19 (1978)). The Committee of Conference, which was assigned to reconcile differences between the Senate and House versions of the 1978 amendments, stated: "It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. *Thus, this amendment codifies existing practice as a specific statutory requirement.*" *Id.* (citing S. REP. No. 890, 95th Cong., 2d Sess. 19 (1978)).

57. Pub. L. No. 95-602, 92 Stat. 2982 (1978).

58. *See supra* note 34.

59. 29 U.S.C. § 794a (1982).

60. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 626 (1983).

61. Section 505(a)(2) states: "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." 29 U.S.C. § 794a(a)(2) (1982). *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 301-04 (5th Cir. 1981) (for discussion of the Rehabilitation Act's effects on federal government hiring).

62. *Darrone*, 465 U.S. at 626 n.1. Note 1 in *Darrone* also mentions that Section 505(a)(1), 29 U.S.C. § 794a(a)(1), indicates that remedies under title VII of the Civil Rights Act are available to those qualifying under a violation of section 501 (relating to the federal government's employment of the handicapped).

courts' treatment of the terms "handicapped individual" and "otherwise qualified"—the decisive elements for coverage under the Rehabilitation Act.

In the majority of cases, federal courts have allowed handicapped individuals who have been discriminated against to maintain suits under section 504. Some employment cases brought under this section focused on whether federal financial assistance given to the employer had the "primary objective" of providing employment.[63] If the primary objective of federal funding was to compensate the aggrieved employee, a cause of action for discrimination existed. *Trageser v. Libbie Rehabilitation Center, Inc.*[64] was the first case in which this interpretation denied a right of action. A registered nurse brought an action seeking reinstatement after being dismissed from employment by a nursing home because of her deteriorating eyesight.[65] The Court of Appeals for the Fourth Circuit held that no private right of action existed under section 504 because of the limiting language of section 505(a)(2). The language refers to the rights, remedies, and procedures found in Title VI of the Civil Rights Act, which prohibits a private right of action unless the federal funding given to a program was used primarily for employment.[66] This ruling was "blithely followed"[67] by three other appellate courts, two of which included strong disagreement with the majority ruling.[68]

The Court of Appeals for the Eleventh Circuit, in *Jones v. Metropolitan Atlanta Rapid Transit Authority*,[69] criticized the decision in *Trageser*[70] and allowed a similar action for violation of section 504 of the Act. In *Jones*, the court held that a former bus driver could bring an action for a section 504 violation, caused by the metropolitan transit authority dismissal of the driver because of a hearing impairment.[71] The Eleventh Circuit, in refusing to follow the *Trageser* "primary objective" standard, based its holding on the section's legislative history and the fact that Congress only intended to include the rights, remedies, and procedures—not the restrictions found in Title VI.[72] The court determined

63. These cases held that section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. § 794(a)(1) (1982), created by the Act's 1978 amendments, included the restrictions of Section 604 of the Civil Rights Act of 1964. *See infra* note 66 (for specific language of section 604 relating to "primary objective").

64. 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

65. *Id.*

66. *Id.* at 89. Section 604 of the Civil Rights Act reads: "Nothing contained in this subchapter shall be construed to authorize action . . . by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3 (1982) (from *Le Strange*, 687 F.2d 767, 778 (1982)).

67. *Employment Discrimination*, *supra* note 39, at 583.

68. *See generally* Scanlon v. Atascadero State Hosp., 677 F.2d 1271, 1272 (9th Cir. 1982) (Ferguson, J., dissenting); United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 676 (8th Cir. 1980) (McMillan., J., concurring).

69. 681 F.2d 1376 (11th Cir. 1982).

70. *Id.* at 1382 n.14 (unanimous).

71. *Id.* at 1376.

72. *Id.* at 1378-80 ("legislative history is devoid of language demonstrating that Con-

that standing for a section 504 action required the plaintiff to show that the employer received federal funds and that the plaintiff was the intended beneficiary of such funds.[73]

The federal courts have often used a four part test, developed by the Supreme Court in *Cort v. Ash*,[74] to determine if a private right of action exists in the violation of a statute which contains no explicit authorization for such a suit. The four factors considered are:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted'[75]—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[76]

With the initial issue of a private right of action having been resolved, the federal courts turned their attention to when a suit involving the Act's coverage was ripe for judicial determination. The decision in *Cherry v. Mathews*[77] addressed the specific issue concerning the HEW's procrastination in implementing regulations and administrative remedies.[78] In *Cherry*, the District Court for the District of Columbia compelled the Secretary of HEW to "swiftly" promulgate the implementation regulations for the Rehabilitation Act.[79] This decision, forcing the HEW to issue the long awaited regulations, led to the requirement that administrative remedies must be exhausted before seek-

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gress intended Section 604 of Title VI to apply to suits under the Rehabilitation Act . . . .").

73. *Id.* at 1382.

74. 422 U.S. 66 (1975). *Ash* involved a private and derivative suit brought by a stockholder in Bethlehem Steel Corp. for damages and injunctive relief against the corporate directors' authorization of general corporate fund expenditures for advertisements relating to the 1972 presidential elections. The District Court for the Eastern District of Pennsylvania denied Ash's petition for injunctive relief and granted, without opinion, defendant's motion for summary judgment. 350 F. Supp. 227 (1972). The court held that the applicable criminal statute prohibiting such contributions was limited to penal sanctions, and implied no private cause of action. 350 F. Supp. at 231.

The Third Circuit Court of Appeals reversed, holding that a private cause of action was proper to remedy a violation of the statute and to secure relief. 496 F.2d 416, 424 (3d Cir. 1974). The Supreme Court reversed the court of appeals and held that the provision of a criminal penalty in a statute does not necessarily preclude an implied private cause of action for damages, 422 U.S. at 79 (citing Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201-02 (1967)), but in the case at hand, no statutory basis existed whatsoever. 422 U.S. at 80.

75. 422 U.S. 66, 78 (1975) (citing Texas & Pac. R. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).

76. *Id.* at 78.

77. 419 F. Supp. 922 (D.D.C. 1976).

78. *See generally* 419 F. Supp. 922 (D.D.C. 1976). *See also supra* note 49-51 and accompanying text (for discussion of the HEW procedures).

79. *Cherry*, 419 F. Supp. at 924.

ing judicial relief under section 504.[80] Such an obligation was important because prior to the effective date of the HEW regulations,[81] the exhaustion of remedies had not been essential or practical due to the lack of procedures for relief available to officials outside of the judiciary.

The Court of Appeals for the Seventh Circuit, in *Lloyd v. Regional Transportation Authority*,[82] held that administrative remedies were not required since no enforcement regulations providing adequate relief yet existed.[83] The court felt that the plaintiffs were the people in the best position to seek enforcement of section 504 since that legislation was enacted for their protection.[84] Only if a suit was brought under a section 504 violation, prior to implementation of the regulations, and an alternative request for relief was filed under another administrative statute,[85] did the courts generally require that all administrative remedies must first be exhausted.[86]

To establish a prima facie case for a section 504 employment discrimination violation, a plaintiff does not have to prove that the employer intentionally discriminated.[87] The only proof required is that "the challenged standard disparately disadvantages the protected group of which he is a member, and that he is qualified for the position under all but the challenged criteria."[88] These elements were established in *Prewitt v. United Postal Service*,[89] where a handicapped individual with limited mobility in one arm and shoulder applied for the position of mail clerk with the United States Postal Service, but was refused employment. On appeal in an action for violation of the Rehabilitation Act, the Fifth Circuit Court of Appeals reversed the district court's decision rendering summary judgment for the Postal Service, and remanded the case to de-

80. *See* 45 C.F.R. § 84 (1986) (for regulations).

81. June 3, 1977 (nearly four years after the passage of the Rehabilitation Act).

82. 548 F.2d 1277 (7th Cir. 1977) (action brought by mobility-disabled persons seeking injunctive relief against public transportation authority; the court vacated an order dismissing the action and remanded the case).

83. *Id.* at 1286.

84. *Id.* at 1285-87.

85. For example, if a plaintiff, in addition to a request for relief under section 504, included a request under section 503 of the Rehabilitation Act, 29 U.S.C. § 793, or section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (both of which provide for administrative enforcement), the remedies therein must be exhausted prior to the availability of judicial relief. Annotation, *Construction and Effect of Section 504 of the Rehabilitation Act of 1973 Prohibiting Discrimination Against Otherwise Qualified Handicapped Individuals in Specified Programs or Activities*, 44 A.L.R. FED. 148, 169 (1979) [hereinafter *Effect of Section 504*].

86. *See* NAACP v. Wilmington Medical Center, Inc., 426 F. Supp. 919, 924-25 (D.D.C. 1977); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 816-18 (E.D. Pa. 1977).

87. Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."). The Court held that an employer could not use written tests and a high school degree requirement if those criteria were not shown to be related to job performance. This case is the leading decision on "disparate impact" discrimination (*see infra* note 139 and accompanying text for definition).

88. Prewitt v. United States Postal Serv., 662 F.2d 292, 306 (5th Cir. 1981). The burden then shifts to the employer who must prove that the challenged criteria are "job related." *Id.*

89. 662 F.2d 292 (5th Cir. 1981).

termine if the standards relied upon by the Service were unfair. The court of appeals held that the appellant had made a prima facie case of discrimination based on a factual showing that he was handicapped and "otherwise qualified" for the position.[90] This was established by the fact that Prewitt had previously performed similar postal duties in a satisfactory manner, despite his handicap, and by an affidavit verifying that his condition had not changed since such performance.[91] These undisputed facts were sufficient, in view of the lack of contrary evidence, to raise the issue of whether the Postal Service's standards and actions in this case were justifiable.[92]

The early case law involving the Rehabilitation Act generally included procedural questions. However, such questions have not been major issues in subsequent litigation. The disputes presented before the courts since these early decisions, as well as those presently being litigated, focus on the interpretation of two key terms which determine whether an individual is protected by the Act—"handicapped individual" and "otherwise qualified." The following two sections of this Comment will review many of the cases which defined conditions amounting to a handicap under the Act and those cases which helped to guide courts in determining requirements for being otherwise qualified.

1. Handicapped Individual

The term "handicapped individual" under the Rehabilitation Act of 1973 is defined in terms of a history of "physical or mental impairment" which limits the aggrieved's activities.[93] The interpretation of a "handicapped individual" has been a paramount consideration in the federal courts' grants of relief in cases involving different conditions covered by section 504.

In *Drennon v. Philadelphia General Hospital*,[94] the District Court for the Eastern District of Pennsylvania addressed such an issue involving an

90. *Id.* at 309.

91. *Id.*

92. *Id.* The standards for postal carriers involved "the ability to see, hear, lift heavy weights, carry moderate weights, reach above shoulder, and use fingers and both hands." *Id.* at 298. The postal authorities, upon advice of a postal medical officer who determined Prewitt "medically unsuitable for postal employment," informed the claimant of his rejection without stating any reasons for the findings. A similar result was arrived at on appeal to a regional medical officer. Both doctors based their conclusions on an eight year-old Veteran's Administration ("VA") medical record, since Prewitt refused to take a voluntary physical. *Id.* at 298-99. The district court based its summary judgment on this refusal, stating that Prewitt could not use the VA report as foundation for his action when it "disclose[s] substantial disability [30% disability causing limited arm and shoulder use]." *Id.* at 300.

93. *See supra* note 43. "Physical or mental impairment" is defined as:

> (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1613.702(b) (1986).

94. 428 F. Supp. 809 (E.D. Pa. 1977).

individual who was denied employment at a hospital because she had experienced an epileptic seizure within two years of her application for the position. The court denied a motion to dismiss the complaint, and stated that it was too "self evident" that persons with epilepsy are handicapped and that such a determination "could not better foster the goals of the legislation in question."[95] Similarly, in *Duran v. City of Tampa*,[96] a motion to dismiss the discrimination action was denied by the District Court for the Middle District of Florida. The plaintiff had been refused consideration for the position of policeman because of a history of epilepsy. This history was limited to his childhood since he had not experienced any symptoms in sixteen years and had not taken any medicine for the disease for nine years.[97] Even though he was no longer considered an epileptic, the court determined that his claim was still actionable under the "perceived handicap" language of the Act, reasoning that his history with the handicap and the treatment relating to that handicap justified such an action.[98]

In *Halderman v. Pennhurst State School & Hospital*,[99] retarded residents of a state-operated school were considered "handicapped individuals" under section 504. The suit was brought by one of the retarded residents of Pennhurst as a class action, alleging that "unsanitary, inhumane, and dangerous" conditions existed at the school, and that conditions denied the class members their rights under the Rehabilitation Act.[100] The court, in recognizing the substandard care given to the residents, ordered that they be provided with nondiscriminatory habilitation.[101] In *Doe v. Colautti*,[102] the District Court for the Eastern District

95. *Id.* at 815.

96. 430 F. Supp. 75 (M.D. Fla.), *final order*, 451 F. Supp. 954 (M.D. Fla. 1977).

97. 430 F. Supp. at 76.

98. *Id.* at 78. The Act states that a handicapped individual is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, *(ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.*" 29 U.S.C. § 706(7)(B) (1982) (emphasis added). For the full text of the definition of "handicapped individual" under the Rehabilitation Act, *see supra* note 43.

99. 446 F. Supp. 1295 (E.D. Pa. 1978), *aff'd in part, rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981).

100. 446 F. Supp. at 1296. In addition to claims under the Rehabilitation Act, the class members charged that they were denied rights under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6001 (1982), and the Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969). Also, the claimants stated that conditions denied them due process and equal protection guaranteed under the fourteenth amendment, and subjected them to cruel and unusual punishment in violation of the eighth and fourteenth amendments. The district court found all of these rights to be violated, *id.* at 1308-22, and held that the retarded residents had a right to "minimally adequate habilitation" in the "least restrictive environment." *Id.* at 1314-20. The Third Circuit Court of Appeals affirmed in part and reversed in part, and avoided the constitutional claims of the class members by holding that their rights were protected by the state and federal acts. 612 F.2d 84 (3d Cir. 1979). The court of appeals reversed the district court's determination that the school should be closed. It stated that although an environment less restrictive than that offered by the school would be best for the residents, the Developmentally Disabled Assistance and Bill of Rights Act did not require such action. 612 F.2d at 115.

101. 446 F. Supp. at 1326-29. The Supreme Court affirmed the determination that the retarded residents were "handicapped" under section 504, but disagreed with the degree of conditions the lower courts found necessary under the applicable statute. 451 U.S. 1

of Pennsylvania also held, consistent with the court in *Halderman*, that a mentally impaired individual, specifically an incompetent adult inpatient of a psychiatric hospital, was handicapped under the Act's definition.[103] The court found that the patient suffered from a "physical or mental impairment," in this case a "schizoaffective reaction."[104] Additionally, the individual was regarded as having a "mental or psychological disorder," as found in the regulations promulgated by HEW for defining "handicapped."[105] And, in *Sites v. McKenzie*,[106] an inmate who had served, between the prison and mental hospital, forty five years of a life sentence for murder, was denied access to the vocational rehabilitation program because he was a mentally ill prisoner.[107] The District Court for the Northern District of West Virginia, however, granted the plaintiff's motion for partial summary judgment observing that the prisoner had a record of mental impairment and had been regarded as having such an impairment.[108]

In *New York State Association for Retarded Children v. Carey*,[109] the Second Circuit Court of Appeals affirmed the district court's decision enjoining a board of education from excluding certain mentally retarded children from most classrooms. The mentally retarded children were excluded from regular school classes because they were carriers of the hepatitis B antigen; however, no effort to identify students who did not suffer from any mental retardation, but who still carried the antigen, was made. The court of appeals concluded that the school board made its decision to exclude carriers of the disease premised on a "remote possibility" of infection, which did not substantiate the detrimental effects the children suffered from being excluded from classes.[110] Thus, the court of appeals, based on the prima facie case of discrimination against the handicapped students and the inability of the board of education to "make at least a substantial showing" of its exclusion plan, held that the board's plan violated the Rehabilitation Act.[111]

Not only have the federal courts held that an individual may be handicapped by a disease or a mental condition, but they have also included individuals affected by blindness and hearing impairments. For example, a blind woman, alleging that the hiring practices of a city school district discriminated against visually handicapped teachers, was considered a "handicapped individual" by the District Court of the East-

(1981). The Court technically distinguished between the terms "treatment" and "habilitation." The former has application to "curable mental illness," while the latter involves "education and training for those, such as the mentally retarded, who are not ill." 451 U.S. at 7 n.2.

102. 454 F. Supp. 621 (E.D. Pa. 1978).
103. *Id.* at 626.
104. *Id.* at 625-26.
105. *Id.* at 626. *See also supra* note 93 and accompanying text.
106. 423 F. Supp. 1190 (N.D. W. Va. 1976).
107. *Id.* at 1197.
108. *Id.*
109. 612 F.2d 644 (2d Cir. 1979).
110. *Id.* at 650-51.
111. *Id.* at 645.

ern District of Pennsylvania in *Gurmankin v. Costanzo*.[112] The court ordered the school district to offer the plaintiff employment as a secondary school teacher. Although it had found that the Act was "not dispositive of the . . . case," since the acts complained of happened prior to the effective date of the 1973 legislation, the court noted that it was "reasonably clear that a refusal to hire a blind person as a teacher is the kind of discrimination which that section was meant to prohibit."[113] Similarly, in *Davis v. Southeastern Community College*,[114] a woman with a hearing disability was denied admission by officials to an associate nursing degree program because of her hearing defect. The facts stipulated that the woman would be capable of managing the academic aspects of the program, but her ability to communicate in surroundings where she was unable to lip read presented difficult obstacles.[115] The district court, although agreeing with the plaintiff's argument that the affliction was one provided for under the definition of "handicapped individual," found that she was not "otherwise qualified" under section 504 because she could not "function sufficiently in the position sought in spite of the handicap, [even] if proper training and facilities are suitable and available."[116]

Section 504 of the Rehabilitation Act has also been found to include drug addicts or persons with a history of drug use within its protection. In *Davis v. Bucher*,[117] the district court granted the plaintiff's motion for summary judgment where a municipality refused to employ individuals with a history of drug use. One of the individuals, Davis, had used amphetamines by injection in the past and, upon the discovery of his needle scars during a medical examination, was denied admittance to the next class of firemen.[118] The court noted that the Act excluded only those who are alcoholic or drug abusers and whose *current use* of alcohol or drugs prevents them from performing the duties of the job, or whose employment because of alcohol or drug abuse would pose a direct threat to property or the safety of others.[119] It did not exclude those with a *prior history* of drug addiction, and thus, the city's *per se* exclusion of individuals with this history denied the benefits of a federally funded program to those who had overcome their addiction or were attempting to

112. 411 F. Supp. 982 (E.D. Pa. 1976).

113. *Id.* at 989.

114. 424 F. Supp. 1341 (E.D. N.C. 1976), *aff'd in part, rev'd in part*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979).

115. 424 F. Supp. at 1343. The court stated that "in many situations such as an operation room, intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lip reading impossible." An audiologist that examined Davis found that her understanding of speech, though aided by the use of a hearing aid, would require lip reading. *Id.*

116. *Id.* at 1345-46. The court noted that Davis' "handicap actually prevents her from safely performing in both her training program and her proposed profession" because of "numerous situations where [her] particular disability would render her unable to function properly." *Id.* at 1345.

117. 451 F. Supp. 791 (E.D. Pa. 1978).

118. *Id.* at 794.

119. 29 U.S.C. § 706 (7)(B) (1982).

do so.[120]

2. Otherwise Qualified

The federal courts have also held that, in addition to being a "handicapped individual," one must also be "otherwise qualified" to be granted relief under section 504.[121] In *Kampmeier v. Nyquist*,[122] the Court of Appeals for the Second Circuit affirmed a lower court order denying a preliminary injunction against school officials who refused to allow two junior high school students to participate in contact sports. One of the students was nearly blind in one eye, and the other suffered from a congenital cataract.[123] The officials would not allow the two to participate in contact interscholastic sports even though they had done so in the past. The court based its denial of the injunction on the lack of evidence by the plaintiffs to establish that they were "otherwise qualified" to play in contact sports, and the defense's reliance on a medical opinion that children with sight in one eye were not "qualified" to participate in the sports because of a high risk of serious eye injury.[124]

In another decision denying an injunction against school officials, the Court of Appeals for the Second Circuit, in *Doe v. New York University*,[125] reversed a district court's grant of relief for the plaintiff. In the action for mandatory preliminary injunction for readmission into medical school, a former medical student, who was suffering from mental illness, failed to prove that she was "otherwise qualified" as required by section 504. The court of appeals determined that there was significant risk of recurrence of her mental disturbances, and therefore, in view of the seriousness of harm inflicted in prior episodes, the school was not required to give preference to her over other qualified applicants who did not pose any such risk.[126] The opinion noted that:

> The institution need not dispense with reasonable precautions or requirements which it would normally impose for safe participation by students, doctors and patients in its activities. Section 504 simply insures the institution's even-handed treatment of a handicapped applicant who meets reasonable standards so that he or she will not be discriminated against solely because of the handicap. But if the handicap could reasonably be viewed as posing a substantial risk that the applicant would be unable to meet its reasonable standards, the institution is

120. *Id.* at 796; *see Effect of Section 504*, *supra* note 85, at 178.

121. 29 U.S.C. § 794 (1982); 45 C.F.R. § 84 contains regulations implementing section 504 of the Rehabilitation Act of 1973, including definitions of "otherwise qualified," 45 C.F.R. § 843(k); *see also* 29 C.F.R. § 1613.702 (1986) (Equal Employment Opportunity Commission definitions relative to section 504).

122. 553 F.2d 296 (2d Cir. 1977).

123. *Id.* at 298.

124. *Id.* at 299-300; *see Effect of Section 504*, *supra* note 85, at 179.

125. 666 F.2d 761 (2d Cir. 1981).

126. *Id.* at 776-77. *Doe* would also pose a significant risk to others during the violent outbreaks caused by her illness. *See id.* at 775. *See also* Strathie v. Department of Transp., 716 F.2d 227, 232-34 (3d Cir. 1983) (where hearing impaired bus driver might pose a risk to passengers).

> not obligated by the Act to alter, dilute or bend them to admit the handicapped applicant.[127]

The court of appeals pointed out that, even if Doe presented sufficient evidence that risk of recurrence was minimal, the medical school would not be prohibited from producing evidence that showed she was less qualified than another applicant.[128]

In the first Supreme Court case to interpret section 504 of the Rehabilitation Act,[129] *Southeastern Community College v. Davis*,[130] the Court gave its approval of the district court's interpretation of "otherwise qualified" when it defined the term as "one who is able to meet all of a program's requirements *in spite of* his handicap."[131] The district court concluded that qualification is premised on the individual being "otherwise able to function sufficiently in the position sought . . . if proper training and facilities are suitable and available."[132] The Court felt these conclusions seem to "reinforce, rather than contradict," the regulations promulgated by HEW, as compared to the interpretations given "otherwise qualified" by the court of appeals.[133] The opinion is clear that an individual must still be qualified *despite* the disabling condition, and that the HEW regulations are important in assisting activities and programs receiving federal funding in determining the qualifications required under the Act.[134]

Simon v. St. Louis County[135] followed *Davis* and involved a suit brought by a former police officer who alleged that the subsequent failure by the police department to rehire him after his discharge violated the Rehabilitation Act.[136] The plaintiff had suffered a gunshot wound that left him a paraplegic and was dismissed because he was unable to meet some of the job requirements the department felt "necessary and

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127. *Doe*, 666 F.2d at 775 (citing *Davis*, 442 U.S. 397, 413 n.12 (1979)).

128. *Id.* at 780. According to information available at the time of the *Doe* decision, New York University Medical School received roughly 5,000 applications per year, of which about 170 were accepted. *Id.* at 765. This represents a rate of acceptance of about 3.4 percent of all those applying to the school. There is no doubt that those who enter the school have impressive qualifications, as do many who are unsuccessful in their attempts.

129. *Davis*, being the first Supreme Court case concerning this area, "may be susceptible to broader interpretation than intended by the Supreme Court." Note, *Southeastern Community College v. Davis, Section 504, and Handicapped Rights*, 16 CAL. W.L. REV. 523, 542 (1980). This theory refers to the desire of institutions receiving federal funds to avoid modifications to accommodate the handicapped. The institutions, such as colleges and universities, might regard the holding in *Davis* as requiring no modifications in the physical requirements of a clinical training program. The holding actually distinguishes between the essential and nonessential requirements of a program, the latter being the area where reasonable accommodation must be provided. *Id.*

130. 442 U.S. 397 (1979).

131. *Id.* at 406 (emphasis added).

132. 424 F. Supp. 1341, 1345 (E.D. N.C. 1976).

133. *Id.* The applicable regulation for a "qualified handicapped person" relative to post-secondary and vocational education services is "a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity. . . ." 45 C.F.R. § 84.3 (k)(3) (1982)).

134. *See id. See also Rehabilitating Section 504*, *supra* note 27 (additional discussion of effects of *Davis* on the Rehabilitation Act).

135. 656 F.2d 316 (8th Cir. 1981).

136. *Id.* at 316.

legitimate."[137] This case, as in *Davis*, revolved around whether the handicap suffered created a situation in which the aggrieved could not meet the requirements of being "otherwise qualified." In *Davis*, the requirements were found to be necessary to safely fulfill the obligations of the job. Conversely, in *Simon* there was substantial evidence indicating that the physical requirements were not necessary or not required by all officers,[138] and therefore, the case was remanded to decide this issue.[139]

In *Gurmankin v. Costanzo*,[140] the District Court of the Eastern District of Pennsylvania held that blindness does not automatically prevent a teacher from being "otherwise qualified." Noting the special problems that face blind teachers,[141] the court required that a nondiscriminatory evaluation must be made to determine her competency.[142] Similarly, the court in *Duran v. Tampa*[143] denied a motion to dismiss the action because it recognized that the plaintiff appeared to be "otherwise qualified."[144] In reaching this decision, the District Court for the Middle District of Florida took notice of the *Gurmankin* court's evaluation requirement[145] and heard expert testimony from two physicians who specialize in neurological disorders. After examining the plaintiff, the court separately concluded that Duran was perfectly able to physically perform as a policeman, and that his likelihood of having a seizure was

137. *Id.* at 320.

138. *Id.* at 320-21.

139. This case, along with *Davis*, discussed the modification of existing requirements to accommodate the "otherwise qualified" handicapped employee; *see Davis*, 442 U.S. at 412-413. In Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981), the court noted four distinct types of discriminatory barriers that handicapped persons must confront when seeking employment: (1) intentional discrimination for reasons of social bias, i. e., racial, sexual, handicapped, etc.; (2) neutral standards with disparate impact; (3) surmountable impairment barriers; (4) insurmountable impairment barriers. *Id.* at 293-94 (citing the Rehabilitation Act of 1973, Sections 501, 503-05, 29 U.S.C. §§ 791, 793-94(a)). If the essential duties of the position in question can be performed by the handicapped individual without any accommodation, the individual is a victim of "disparate impact" discrimination; if reasonable accommodation is afforded and the job can then be done, the individual is a victim of "surmountable barrier" discrimination. *Id.* at 305.

140. 411 F. Supp. 982 (E.D. Pa. 1976).

141. *Id.* at 987-88.

142. *Id.* at 992.

143. 430 F. Supp 75 (M.D. Fla. 1977).

144. *Id.* at 78.

145. *Id.* In *Gurmankin*, the school district's refusal to hire blind teachers amounted to an irrebuttable presumption, involving no competency evaluations. 411 F. Supp. at 990. This is akin to the situation in *Duran*, except there, performance evaluations were made by the city, but ignored upon discovery of the plaintiff's history of epilepsy, based again on an irrebuttable presumption of incompetency. 430 F. Supp at 78.

Gurmankin was ultimately decided on constitutional grounds (fourteenth amendment), unlike *Duran*, which was resolved under the Rehabilitation Act. Both courts, though, relied upon the irrebuttable presumption analysis of the Supreme Court in *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974). In *La Fleur*, a pregnant teacher was forced to take a mandatory maternity leave without pay five months prior to the expected delivery date of her child. In holding that this policy of the Cleveland, Ohio school district created an irrebuttable presumption of incompetency, the Court found that due process considerations of the fourteenth amendment had been violated because no rational relationship existed between the policy and the state's interest in continuing education. 414 U.S. at 644-46. *But see* Weinberger v. Salfi, 422 U.S. 749 (1975) (limiting the use of irrebuttable presumption in cases challenging classifications).

equal to that of anyone in the general populace.[146]

In vacating and remanding the case to the district court, the United States Court of Appeals for the Third Circuit, in *Strathie v. Department of Transportation*,[147] held that reasons advanced by the state for auditory hearing requirements must advance the essential purpose of the program. The court produced a standard to determine "otherwise qualified" in terms of accommodation:

> A handicapped individual who cannot meet all of a program's requirements is not otherwise qualified if there is a factual basis in the record reasonably demonstrating that accommodating that individual would require either a modification of the essential nature of the program, or impose an undue burden on the recipient of federal funds.[148]

The court in *Strathie* looked to the decision in *Davis*, in which the Supreme Court articulated the two factors required by the standard.[149] The *Davis* opinion, though, lacked comment on the scope of judicial review concerning the reasonableness of a refusal to accommodate a handicapped individual.[150] Thus, the standard is an attempt at reconciling the concerns of administrators, who demand some deference by the courts due to their experience and knowledge in specific programs, and the problems associated with broad judicial deference.[151]

III. *School Board of Nassau County v. Arline*

A. *Facts*

Gene Arline was a third grade teacher for the School Board of Nassau County in Florida. She had served three years in the district on an

146. *Id.* at 76 (plaintiff's propensity for seizures is not increased by his prior history of epilepsy).

147. 716 F.2d 227 (3d Cir. 1983). Strathie, who wore a hearing aid, was hired and trained as a bus driver by a private bus company. After initial training, he passed Pennsylvania's school bus driving test as required by the state's department of transportation. On his first day of work, Strathie's license was suspended, based on his violation of a state statute which required that the licensee have hearing within certain limits without the use of a hearing aid. Strathie's hearing was within the limits with the use of the hearing aid.

The district court, in a class action suit seeking declaratory and injunctive relief under the fourteenth amendment, the Civil Rights Act, the Rehabilitation Act and certain state law, found for the defendants. Appeal was then taken by Strathie under the Rehabilitation Act and the fourteenth amendment, but the constitutional claim was not addressed by the court.

148. *Id.* at 231; *see* Gisler, *Fair Employment and the Handicapped; A Legal Perspective*, 27 De Paul L. Rev. 953, 980-81 (1978); *see generally* 29 U.S.C. §§ 1613.704 & 1613.705 (1982) ("reasonable accommodation" considerations and determining factors) (selection criteria must pertain to essential functions of program).

149. 716 F.2d at 230 (citing *Davis*, 442 U.S. 397, 410, 412-13 (1979)).

150. *Id.* at 231.

151. *Id.* The court refers to the possibility that broad judicial deference could "undermine Congress' intent in enacting section 504 that stereotypes or generalizations not deny handicapped individuals equal access to federally-funded programs." *Id. See also* Doe v. N.Y. Univ., 666 F.2d 761, 775-76 (2d Cir. 1981) (for discussion of court's limited ability, compared to administrator's expertise, to determine qualification of handicapped individuals); text accompanying notes 125-28 (for discussion of *Doe* and example of deference to administrators).

annual contract when she was retained on a continuing basis. After having worked in Nassau County's public school system for eleven years, Arline suffered a relapse of infectious tuberculosis in 1977, a disease she had first contracted in 1957, at the age of 14.[152] This was the first time in the eleven years that she had worked for the School Board that she tested positive, and the only time since her contraction of the disease. At this point, Arline started chemotherapy treatments, which she continuously received.[153] After a leave of absence, she subsequently returned to work, but in March of 1978, Arline again tested positive for the disease on a sputum culture.[154] Following her temporary suspension from teaching to allow for additional treatment, she returned to work; however, in November of 1978 she tested positive for tuberculosis a third time. After a suspension in April of 1979 and two hearings, the School Board eventually discharged her.[155]

B. *Lower Court Opinions*

Mrs. Arline initially sought relief for her dismissal in state administrative proceedings, basing her complaint on the breach of her continuing contract by the board.[156] This action resulted in a decision by the State Board of Education reversing the School Board's dismissal of Mrs. Arline.[157] An appeal was brought to the First District Court of Appeals of the State of Florida, which held that her tubercular condition was "good and sufficient cause" for her dismissal.[158] In addition, a dissent was filed, which based its opinion—that the failure to perform duties by reason of personal illness is not sufficient grounds for dismissal—on a strict reading of Arline's contract.[159]

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152. Mrs. Arline underwent chemotherapy treatments from 1957, when she discovered she had tuberculosis, to 1960. From 1960 to 1966, the year she was hired by the School Board of Nassau County, Arline had no positive cultures for tuberculosis. School Bd. of Nassau County v. Arline, 408 So. 2d 706, 707 (Fla. Dist. Ct. App. 1982) (*Arline I*).

In 1966, when Mrs. Arline first applied for her teaching position with the school board, her application form contained a question inquiring whether she had any "physical defects or peculiarities," to which she responded "none." After her initial hospitalization for tuberculosis in 1957, her physicians had determined that she was "cured," Brief for Appellant at 2, *Arline*, 107 S. Ct. 1123 (1987).

153. *Arline I*, 408 So. 2d at 707.

154. *See id.* at 707; Brief for Respondent at 3, *Arline*, 107 S. Ct. 1123 (1987).

155. *See Arline I*, 408 So. 2d at 707.

156. *See* Brief for Respondent at 3, *Arline*, 107 S. Ct. 1123 (1987).

157. *See Arline I*, 408 So. 2d at 706. The reasoning behind the school board's release of Mrs. Arline from employment was best proclaimed by superintendent Craig Marsh when he testified that she was not fired because of misconduct, but because of the "continued reoccurrence [sic] of tuberculosis." Joint Appendix at 51-52, *Arline*, 107 S. Ct. 1123 (1987). The Board of Education, in following the findings of the hearing officer in the case, concluded that no "substantial competent evidence" was found in the record to support Mrs. Arline's dismissal by the school board. 408 So. 2d at 707.

158. *Arline I*, 408 So. 2d 706, 707 (Fla. Dist. Ct. App. 1982).

159. *Id.* at 708-09. Paragraph nine of Mrs. Arline's contract read: "Failure of the Teacher to fulfill this contract, and to carry out the lawful provisions hereof, *unless prevented from so doing by reason of personal illness* or as otherwise provided by law, shall constitute sufficient grounds for the termination of the contract by the County Board." *Id.* at 708 (emphasis added). The majority concluded that the only logical interpretation of the provision is that the illness be reasonable in terms of type and duration. They reached this

After being denied relief in state administrative proceedings, Mrs. Arline brought suit in federal district court against the School Board of Nassau County and Craig Marsh,[160] alleging her dismissal violated section 504 of the Rehabilitation Act of 1973.[161] The majority of the medical evidence was presented by Marianne McEuen, M. D.,[162] who testified as to Mrs. Arline's medical history, her risks of infection, and suggestions that the petitioner could teach older students or change to an administrative position as a safer alternative to teaching third graders.[163] The district court, in an oral opinion, ruled in favor of the defendants, holding that the petitioner, though suffering from a handicap, was not a "handicapped person" under the Act.[164] The court reasoned that it was "difficult . . . to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person," and even so, Arline was not "qualified" to teach elementary school.[165]

The Court of Appeals for the Eleventh Circuit[166] reversed and remanded the case, holding that contagious tuberculosis constitutes a "handicap" under section 706(7)(B) of the Rehabilitation Act, and that further findings were necessary to determine if Arline was "otherwise qualified."[167] Unlike the trial court, the court of appeals found that Arline's affliction "falls . . . neatly within the statutory and regulatory framework,"[168] and that legislative direction presents no "objective evidence" to limit the statute aside from that already specifically ex-

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result by reading this section along with language in the contract permitting the board to require the teacher to provide a negative tuberculosis report and to submit to a physical examination. The majority reasoned that there would be no point to including these requirements if no action could be taken upon their results. *Id.* The dissent read the provision as clear and unambiguous—it does not authorize the board to terminate the contract upon physical incapability of Mrs. Arline to do her job. The dissent went on to say that even if someone found the language to be ambiguous, rules pertaining to the construction of contracts state that the ambiguity should be interpreted most strongly against the party writing or selecting the language. In this case, the contract was a form prepared pursuant to the rules of the State Board of Education of Florida, and therefore should be read most favorably towards Mrs. Arline. *Id.* at 708-09.

160. Mr. Marsh was a party in both an individual capacity and as Superintendent of Schools of Nassau County, Florida.

161. Arline v. School Bd. of Nassau County, 772 F.2d 759, 760 (11th Cir. 1985) (*Arline II*). Arline additionally brought an action in this court, which was also considered in the court of appeals, alleging a violation of 42 U.S.C. § 1983 (denying due process of law). Since this point was not appealed to the Supreme Court level, it will not be dealt with here.

162. An assistant director of the Community Tuberculosis Control Service of the Florida Department of Health and Rehabilitative Services, Dr. McEuen, testified as an expert on tuberculosis.

163. Joint Appendix at 15, 18-19, *Arline*, 107 S. Ct. 1123 (1987) (*Arline III*). Dr. McEuen testified that young children were more susceptible to infection than older children. *Id.*

164. 772 F.2d at 761.

165. *Id.* at 763 (quoting the district court's opinion).

166. *Arline II*, 772 F.2d 759 (11th Cir. 1985).

167. *Id.* at 759.

168. *Id.* at 764. The court noted that whether the person with tuberculosis is presently afflicted ("has a physical or mental impairment which substantially limits . . . major life activities," 29 U.S.C. § 706(7)(B), 45 C.F.R. § 84.3(j)(1)(i)) or is not presently afflicted ("has a record of such an impairment," 45 C.F.R. § 84.3(j)(2)(iii), and "is regarded as having such an impairment," 45 U.S.C. § 84.4(j)(2)(iv)), she is covered by the statute. *Arline II*, 772 F.2d at 764.

cluded.[169] The Eleventh Circuit held they would be reluctant to create exemptions where there is sparse evidence that Congress had any intention of doing so.[170] In remanding the case, the court of appeals stated that the lower court, in concluding that the school board had no duty to accommodate Arline because of its "duty" to protect the public, made:

> [N]o findings resolving the numerous factual disputes as to whether the risks entailed in retaining Arline in her elementary school position precluded her from having the necessary physical qualifications for the job, whether the same would be true if she were transferred to a position teaching less susceptible individuals, or whether the costs involved in accommodating her would place undue burdens on the school system.[171]

An appeal by the school district and Craig Marsh was made to the Supreme Court, which granted certiorari on April 21, 1986,[172] and the case was argued on December 3, 1986.

C. *The Majority*

Justice Brennan delivered the opinion of the Supreme Court of the United States in *School Board of Nassau County v. Arline*,[173] which affirmed the decision of the court of appeals. The Court held that a person who suffers from contagious tuberculosis can be a handicapped individual within the meaning of section 504 of the Rehabilitation Act of 1973, and the Court remanded the case to the district court for determination as to whether Arline is "otherwise qualified."[174] The opinion was based on the statutory and regulatory framework of section 504, and Congress' intent in enacting the legislation.

The Court began by reviewing the history of the Rehabilitation Act, stressing that the legislation covered *all* programs receiving federal funds, and that its intent was a broad coverage[175] of discriminatory practices against the handicapped which restricted opportunities "that other Americans take for granted."[176] The Court also noted Congress was concerned that the discrimination stemmed "not only from simple prejudice, but from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.' "[177]

The Court found the regulations promulgated by the Department of Health and Human Services significant in helping to define "physical

169. *Id.* (referring to section 706(B)(2), which excludes drug and alcohol abusers whose current use affects their job performance or threatens others).

170. *Id.* at 764.

171. *Id.* at 765.

172. 475 U.S. 1118 (1986).

173. 107 S. Ct. 1123 (1987), *aff'g*, 772 F.2d 759 (11th Cir. 1985).

174. *Id.* at 1132. At the time of the writing of this Comment, the case was in the discovery stages in preparation for those questions remanded to the district court.

175. *See supra* notes 30-35 and accompanying text.

176. *Id.* at 1126 (quoting Sen. Humphrey) (citation omitted).

177. *Id.* (citing S. REP. No. 1297, 93d Cong., 2d Sess. 37, 50 (1974)).

impairment"[178] and "major life activities,"[179] used in the definition of a handicapped individual under section 504.[180] Considering these definitions in context with the testimony by Dr. McEuen that Arline's tuberculosis "affected her respiratory system" and that she was hospitalized for such,[181] the Court determined Arline had a record of impairment under 29 U.S.C. § 706(7)(b)(ii) and concluded that she was a handicapped individual.[182]

The Court disagreed with the petitioner's contention that, even if a contagious disease is a handicapping condition, it can be distinguished from the disease's physical effects in this case.[183] Since Arline's contagiousness and physical impairment were both caused by the tuberculosis, the Court noted that allowing an employer to rely upon the distinction between the effects of a disease on others and the effects of a disease on a patient to justify discriminatory treatment would be unfair.[184] The Court also pointed to the fact that congressional history and action show concern about the effect of the handicap on others as well as on the handicapped individual. It used the example of when Congress intended coverage to those " 'regarded as having' a physical or mental impairment;" such an impairment could limit a person's ability to work because of other's negative reactions to the condition.[185] Those negative reactions, including fear and misapprehension of contagiousness, are what the Rehabilitation Act sought to protect against—using sound medical judgment instead of illogical reactions to determine if one is handicapped and "otherwise qualified."[186] The Court stressed that the limited circumstances where a health threat is posed by *some* persons who have contagious diseases does not justify exclusion from the Act's coverage of *all* persons with actual or envisioned contagious diseases.[187]

178. "Physical impairment" is defined as: "(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems . . .; or (2) any mental or psychological disorder . . . ." 45 C.F.R. § 84.3(j)(2)(i) (1986).

179. "Major life activities" is defined as: "[F]unctions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1986).

180. *Arline III*, 107 S. Ct. at 1127. "Handicapped individual" is defined as: "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (1982).

181. This is a factor the Court deemed "more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment." *Arline III*, 107 S. Ct. 1123, 1127 (1987).

182. *Id.*

183. *Id.* at 1128. The petitioners contended that Arline's record of impairment was unimportant in the case at hand, for her dismissal was based upon the threat her possible relapses of tuberculosis had on the health of others, not any diminished physical capabilities.

184. *Id.*; *see also id.* at n.7.

185. *Id.* at 1128-29. The opinion also mentions that "cosmetic disfigurement" is included among the conditions the Department of Health and Human Services listed as illustrative of physical impairments covered by the Act. *Id.* at 1129 n.10.

186. *Id.* at 1129-30.

187. *Id.* at 1130.

In determining that the district court must inquire on remand as to whether Arline is "otherwise qualified,"[188] the Court noted that the inquiry is essential to the section 504 goal of protecting the handicapped from deprivations based on prejudice, stereotypes, or unsubstantiated fear, while balancing such valid concerns as avoiding the exposure of significant health and safety risks to others.[189] The Court agreed with amicus American Medical Association that the inquiry in the context of this case should include findings of fact, based on reasonable medical judgments, about the nature, duration, severity of the risk, and the chances that the disease will be transmitted and cause harm.[190]

D. *The Dissent*

The Court was not without its disagreement, as shown in the dissent written by Chief Justice Rehnquist, who was joined by Justice Scalia.[191] The dissent based its argument on the Supreme Court's prior conclusions in disputes involving recipients of federal funding[192] and the Court's past decisions interpreting section 504 of the Rehabilitation Act.[193] They cited the *Pennhurst State School and Hospital v. Halderman*[194] decision to bring to light the fact that the Court has treated situations that involve the imposition of obligations, required by federal legislation to be placed upon recipients of federal funds, as " 'much in the nature of a contract.' "[195] This "contract," in which Congress exchanges funds in return for the grantee's bearing the cost of providing the handicapped with employment,[196] bases its legitimacy on the voluntary and knowing acceptance of the terms of the exchange by recipients of federal funds.[197] In this case, Congress must speak "with a clear voice" so that the recipient knows the conditions under which the funds are accepted.[198]

This line of reasoning, taken from prior decisions by the Court, is

188. The Supreme Court noted that the district court "made no findings as to the duration and severity of Arline's condition, nor as to the probability that she would transmit the disease, . . . whether Arline was contagious at the time she was discharged, or whether the School Board could have reasonably accommodated her." *Id.* at 1131.

189. *Id.*

190. *Id.* (citing Brief for American Medical Association as Amicus Curiae at 19, *Arline III*, 107 S. Ct. 1123 (1987)).

191. *Arline III*, 107 S. Ct. 1123, 1132 (1987) (Rehnquist, J., dissenting).

192. *See* Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 (1982); Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981) (White, J., dissenting in part); United States v. Bass, 404 U.S. 336 (1971) (Blackmun, J., dissenting).

193. *See* United States Dep't of Transp. v. Paralyzed Veterans of America, 477 U.S. 597 (1986) (Marshall, J., dissenting); Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) (White, J., dissenting); Alexander v. Choate, 469 U.S. 287 (1985); Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984).

194. 451 U.S. 1 (1981).

195. *Arline III*, 107 S. Ct. 1123, 1132 (1987) (citing *Pennhurst*, 451 U.S. at 17) (Rehnquist, J., dissenting).

196. *Id.* (citing United States Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597, 605 (1986) (quoting Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633 n.13 (1983)) (Rehnquist, J., dissenting).

197. *Id.* (citing *Pennhurst*, 451 U.S. at 17) (Rehnquist, J., dissenting).

198. *Id.* (Rehnquist, J., dissenting).

applied by the dissent to conclude that the protections of the Rehabilitation Act do not extend to individuals discharged because of their contagious tuberculosis. Citing the state and federal regulations covering the area of contagious diseases,[199] the dissent noted that two prior cases decided by the Court, which dealt with such regulation and federal funding, held not to read the Act expansively.[200] Since the issue turned on whether discrimination on the basis of contagiousness is discrimination based on a handicap, and the dissenters found the language, regulations, and legislative history of the Act silent on this question, they felt that Arline was not under the Act's coverage.[201]

In criticizing the majority's opinion, the dissent attacked the Court's reasoning that the contagious effects of the disease could not be "meaningfully" distinguished from its effects on the claimant under the Act. The dissent reasoned that recognition by Congress that one could be defined as handicapped based singularly on others' reactions demonstrated that the reactions of others to the condition could not be considered separately from the condition's effect on the claimant.[202] The additional point was made that the Court had no basis for extending discrimination coverage to contagious diseases simply because of *others' reactions* to a condition that might pose a threat to them.[203] Such lack of evidence could in no way substantiate "knowing acceptance" by a receiver of federal funds that their receipt of such is "conditioned on Rehabilitation Act regulation of public health issues."[204]

IV. ANALYSIS

The *School Board of Nassau County v. Arline* opinion expands the coverage of the Rehabilitation Act of 1973 to persons inflicted with contagious tuberculosis if a court deems that they (1) have been discriminated against "solely" by reason of their condition *and* (2) are "otherwise qualified" for the position sought. By not making a final determination on whether Arline was "otherwise qualified," however, the Court left the issue of the effect of contagiousness on qualification a question to be decided by the district court. The district court was provided general guidelines for assistance on this question,[205] which gave deference to

199. *Id.* at 1132-33 nn.1 & 2 (Rehnquist, J., dissenting).

200. *See* Bowen v. American Hosp. Ass'n., 476 U.S. at 648, 650-53 (1986) (regulations and procedures governing the provision of health care to mentally or physically impaired infants are not authorized by section 504 and are invalid); Alexander v. Choate, 469 U.S. 287, 303, 307 (1985) (Tennessee's reduction in annual inpatient hospital coverage and its effect on Medicaid recipients is not covered by section 504).

201. *Arline III*, 107 S. Ct. 1123, 1133 (1987) (Rehnquist, J., dissenting).

202. *Id.* (Rehnquist, J., dissenting).

203. *Id.* at 1133-34 & n.5 (Rehnquist, J., dissenting).

204. *Id.* at 1134 (citing *Pennhurst*, 451 U.S. 1, 17 (1981)) (Rehnquist, J., dissenting).

205. The inquiry should include:

> [F]indings of facts, based on *reasonable medical judgments* given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

public health officials' conclusions on the "otherwise qualified" determination—a noteworthy twist in the judicial treatment of qualification under the Act. Another area of interest is the dissent's generalized issue treatment through comparisons with cases of little factual similarity, and the "contract theory" used in their interpretation of the Act. Finally, although the effects of the *Arline* decision seem to open judicial avenues to the sufferers of contagious diseases, the Court specifically left unanswered whether carriers and sufferers of AIDS are protected by the Act, thereby limiting the precedential value of the decision to case-by-case analysis.

A. *How the Majority "Faired"*

The majority opinion in *Arline* concluded that the respondent was handicapped within the meaning of the Rehabilitation Act because she suffered from a "physiological disorder or condition . . . affecting [her] . . . respiratory [system],"[206] which would be protected by the Act if she were considered "otherwise qualified." The Court stated that the judiciary normally "should defer to the reasonable medical judgments of public health officials" when determining whether a handicapped individual with a contagious disease is qualified to continue in the federally funded activity.[207] The "otherwise qualified" determination was traditionally based on facts collected by a private physician, the handicapped individual's physician or the medical officer of a program.[208] The Supreme Court, however, correctly recognized the authority of public health officials in the area of controlling contagious diseases.[209]

The present management of communicable diseases is governed by both federal and state statutes. This legislation assigns the tasks involved with reporting and isolation to public health officials.[210] These officials, unaffected by the possible biases of the employer or handicapped claimant, can make the "reasonable medical judgements" required for the safety of all involved. Additionally, such officials, based on their constant appraisal and continuing experience in the field of contagious disease, have a knowledge base more than sufficient to effectuate findings superior to an employer's medical officer or a general

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Id. at 1131 (citing Brief for American Medical Association as Amicus Curiae at 19, *Arline III*, 107 S. Ct. 1123 (1987)) (emphasis added).

206. *Arline III*, 107 S. Ct. at 1127; *see* section 706(B)(2) and 29 C.F.R. § 1613.702(b).

207. *Arline III*, 107 S. Ct. at 1131.

208. *See* Southeastern Community College v. Davis, 442 U.S. 397, 400-01 (1979) (handicapped individual diagnosed by medical center audiologist); Doe v. New York Univ., 666 F.2d 761, 769-70 (2d Cir. 1981) ("in-house" psychiatrists); Prewitt v. United States Postal Serv., 662 F.2d 292, 299 (5th Cir. 1981) (postal medical officer); New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 647 (2d Cir. 1979) (city school board using city department of health); Doe v. Colautti, 454 F. Supp. 621, 625 (E.D. Pa. 1978) (personal psychiatrist); Duran v. City of Tampa, 430 F. Supp. 75, 76 (M.D. Fla. 1977) (plaintiff's physicians specializing in neurological disorders).

209. At least one court has followed the directive of the Supreme Court in *Arline* as to deference to public health officials, *see* Kohl v. Woodhaven Learning Center, 676 F. Supp. 945 (W.D. Mo. 1987); *see infra* note 242 (additional information on *Kohl*).

210. *See supra* notes 11-23 and accompanying text.

physician.[211] Thus, the Court, in deferring the finding of facts concerning Mrs. Arline's health condition to public health authorities, balanced the federal interest in suppressing discrimination with the state interest in controlling contagious disease.

The majority, elaborating on the state interest of controlling communicable diseases, pointed to the inclusion of contagious diseases within the definition of "handicapped individual" as helping the state in combating the spread of such infectious diseases. It reasoned that individuals would be less reluctant to disclose a contagious condition if assured, by the Rehabilitation Act, of rational responses by employers and sound medical judgments by public health officials as to whether they were "otherwise qualified" to continue working.[212] The presence of federal legislation in the area of federal-state cooperation regarding the control and prevention of communicable disease also supports the majority's position. Statutory authorization is given to the Secretary of HHS to accept from and give assistance to state and local authorities in the prevention and suppression of communicable disease.[213]

An individual must be both handicapped and "otherwise qualified" to be entitled to protection under the Rehabilitation Act, and Arline, suffering from contagious tuberculosis, *is* handicapped.[214] This decision followed the intentions of Congress and treated the respondent fairly, while leaving open the opportunity for the petitioner to prove Arline unqualified in order to protect the school district from any reasonable risks presented by the disease.[215] If the law did not weigh both sides, but rather solely based decisions on finding an individual "handicapped," the employer would not be allowed to discriminate between a qualified and unqualified applicant. The employer would be forced to place a handicapped and contagious individual in the work place without regard to qualification, and anyone who was in contact with the carrier would be in danger of contracting the ailment.[216]

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211. An inconsistency in the record of the case created the opportunity for the Supreme Court to act on this issue. An *amicus curiae* brief for *Arline* was filed which stated findings that contradicted Arline's record of tuberculosis. The Court, in coping with this administrative dilemma, reasoned that the expertise in communicable diseases lies with public health officials.

212. *Arline III*, 107 S. Ct. at 1130 n.15.

213. *See* 42 U.S.C. § 243.

214. *See supra* notes 93-151 and accompanying text.

215. Dr. McEuen testified that three factors provide the basis for determining the chances of getting tuberculosis. The *extent of contagiousness* of the carrier is "a matter of degree," and is determined from the number of bacilli found in either the sputum culture, which takes several weeks to grow, or from a microscopic examination of a stained sputum smear. The *age of the exposed individual* also varies the risks involved; a young child is more susceptible than is an older child or adult. Additionally, the *length of time* spent in a confined area with the carrier affects the level of contagiousness. Joint Appendix at 16, 37-38, *Arline III*, 107 S. Ct. 1123 (1987).

216. *See Arline III*, 107 S. Ct. at 1129-30. On the subject of accommodation, the Court stated that employers have an affirmative obligation to reasonably accommodate handicapped employees; and "[a]lthough they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." *Id.* at 1131 n.19. *See* 45 C.F.R. § 84.12 & app. A at 315-16 (1986). The Nassau

Empathy with the School Board of Nassau County, which felt threatened by this type of situation, is understandable. Upon examination of the interests in the health of the children attending the school at which Arline taught, the worries of those children's parents, and the advice of the consulted health official,[217] one could arrive at the response taken by the School Board. Yet, this does not make the discriminatory action legal. The Court's demand for a case-by-case analysis of "otherwise qualified," based upon reasonable medical judgments by public health officials, provides rational treatment deserved by those who must deal with the real, as well as imagined, fears associated with such a contagious impairment.[218] It also serves to limit this holding to an expansion of the list of possible conditions covered by the Act and, thus, makes no universal ruling on the question of "otherwise qualified."

B. *How the Dissent Struggled*

The dissent was hindered by its inability to fathom the majority's reasoning and analyze the facts in a logical, supportable manner. They criticized the majority's holding for invading extensive state regulation of contagious diseases, arguing that the Court "has declined to read the Rehabilitation Act expansively" when faced with an area so regulated.[219] The dissent relied on general statements that the Court made in *Bowen v. American Hospital Association*[220] and *Alexander v. Choate*,[221] but these statements are principles tailored for those particular decisions, both of which involved questions other than whether an individual is "handicapped." *Bowen* discussed whether the Act *authorizes* HHS to promulgate mandatory provisions requiring strict procedures in treatment of handicapped infants based on their absolute right to receive services

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County School Board has a policy of allowing teachers to teach out of certification until they can receive such. This alternative was not offered to Arline, though Dr. McEuen felt that it was within reasonable medical judgment that she could teach older children. Joint Appendix at 15, 19.

217. *See supra* notes 163 & 214 (determinations of Dr. McEuen).

218. This reasoning was also used in a New York City Supreme Court case, District 27 Community School v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986):

> Although this court certainly empathizes with the fears and concerns of parents for the health and welfare of their children within the school setting, at the same time it is duty bound to objectively evaluate the issue of automatic exclusion according to the evidence gathered and not to be influenced by unsubstantiated fears of catastrophe.

Id. at 413, 502 N.Y.S.2d at 335.

219. *Arline III*, 107 S. Ct. at 1132-33 (citations omitted). The dissent remarked on how the Court, in *Pennhurst*, 451 U.S. 1 (1981), made it clear that, "where Congress intends to impose a condition on the grant of federal funds, 'it must do so unambiguously.'" *Arline III*, 107 S. Ct. at 1132 (citing *Pennhurst*, 451 U.S. at 17) (Rehnquist, J., dissenting). The dissent cites various state statutes regulating contagious diseases, which address "reporting requirements, quarantines, denial of marriage licenses based on the presence of certain diseases, compulsory immunization, and certification and medical testing requirements for school employees." *Id.* at 1132 n.2. (citations omitted) (Rehnquist, J., dissenting). *See supra* notes 192-204 and accompanying text.

220. 476 U.S. 610 (1986).

221. 469 U.S. 287 (1985) (Tennessee's reduction in annual inpatient hospital coverage and its effect on Medicaid recipients is not covered by section 504)).

or benefits from federally-funded state agencies.[222] *Alexander* considered whether the Act forces a state to *alter* its regulations to provide the *most favorable services* for Medicaid recipients.[223] These issues sharply contrast with the questions presented in *Arline*, which addressed the inclusion of an individual's physical impairment *as a handicap* defined by the Act, and whether, based upon a case-by-case analysis, the individual is "otherwise qualified" for participation in the federally-funded program involved.[224]

Bowen briefly touched upon the issue of whether the infant involved, born with a congenital defect, was handicapped and possibly "otherwise qualified." The Court recognized that the Act's use of handicapped individual included infants with congenital defects, and that "meaningful access" to medical services would be required by the Act if the infant were "otherwise qualified" and denied the services.[225] However, the Court noted that "no such rule or policy is challenged, or indeed has been identified, in this case," and that no specific decision as to treatment of an individual was in question. The specific issue raised by the action was whether four mandatory rules relating to procedure and treatment of the infants were authorized by section 504 of the Act.[226]

The facts in *Alexander* involved a state proposal to limit the number of annual inpatient hospital days that state Medicaid would pay hospitals for Medicaid patients. The issues, as those in *Bowen*, centered on the

222. 476 U.S. at 610-11, 624. (regulations and procedures governing the provision of health care to mentally or physically impaired infants are not authorized by section 504 and are invalid).

223. 469 U.S. at 287-88, 303, 307-09.

224. *See supra* notes 173-90 and accompanying text.

225. 476 U.S. 610, 624 (1986). The American Medical Association and the American Hospital Association, along with other medical associations, brought an action to declare certain rules promulgated by HHS—entitled "Final Rules"—invalid and to enjoin their enforcement. The Final Rules in question, which formed procedures in the health care of handicapped infants, required that (1) health care providers post notices stating that section 504 bars the withholding of health care from infants on the basis of mental or physical impairments; (2) state child protective services agencies prevent unlawful medical neglect of handicapped infants; (3) immediate access to patient medical records be provided; and (4) expedited compliance actions be taken. *Id.* at 610-11, 613-14.

226. *Id.* at 624-26. In formulating its opinion, the Court examined *United States v. University Hospital, 575 F. Supp. 607 (E.D. N.Y. 1983), aff'd*, 729 F.2d 144 (2d Cir. 1984). The facts involved an infant born with multiple congenital defects who required corrective surgery to prolong the child's life. The parents of the child decided against the surgery, which would not have dramatically affected the infant's handicapping conditions, and the hospital did not proceed with the operation. Public health officials, acting on an anonymous complaint of medical neglect, requested the hospital to release the records on the case, and the hospital declined, noting that the parents had given no consent for any release. 575 F. Supp. at 614-15.

The district court, in ruling on an action brought by the government based partially upon its authority to enforce section 504, stated that the evidence established that no right to access the information existed under the facts of the case. No violation of the Act had occurred, the court said, for the hospital had always been willing to operate, but had not done so because of the parents refusal to consent, not because the infant was handicapped. *Id.*

The *Bowen* Court used this same reasoning in finding that no violation of section 504 can occur when parental consent for medical treatment is withheld: "without the consent of the parents . . . the infant is neither 'otherwise qualified' for treatment nor has he been denied care 'solely by reason of his handicap.'" 476 U.S. at 630 (footnote omitted).

standards to be applied in a situation involving the handicapped—not whether individuals themselves are handicapped.[227] Questions were raised by Medicaid recipients about specific limitations or any limitations, for such limitations would have a disproportionate effect on the handicapped resulting in disparate impact discrimination. The Court held that the limitation had no discriminatory motive, and that the assistance provided to the handicapped need not amount to more coverage than is received by non-handicapped individuals.[228]

These cases involved a paucity of factual consistency with *Arline*, and such dissimilarity is pivotal in the present analysis. *Bowen's* authorization of procedural rules and *Alexander's* degrees of accommodation involved situations where an expansive reading of the Act would *absolutely* limit a state's freedom in certain circumstances, as when performing services and benefits and adapting accommodation policies to unique circumstances. The expansion including communicable diseases as a handicap under *Arline* does not involve any such absolute restrictions or limitations. It is, instead, an application of federal law—not an extension over state law—and in this light, the comparison between the decision in *Arline* with *Bowen* and *Alexander* is irrelevant.

This treatment of the issues is even more absurd when considering that the dissent simply ignored the broad construction[229] and expansive language of the Rehabilitation Act, in which the facts of Arline's condition so readily fit. If they had applied the language as broadly as they handled the issues, the dissent might have interpreted the facts as had the majority. Instead, they determined that judicially-implied federal obligations to funded programs should override the plain language of existing federal legislation.

The dissent's "obligation" theory, formulated from *Pennhurst State School and Hospital v. Halderman*,[230] and nonexpansion philosophy, formulated from *Bowen* and *Alexander*, advocate that decisions on *whether an individual is handicapped* should be based on the view that federal legislation imposing obligations only on recipients of federal funds is "much in

227. Since the limitations had not taken effect prior to the class action suit, *Alexander* did not involve any discrimination against an individual, but like *Bowen*, the problem was policy-based. In each case, the Court held that the policy or effect of the policy in question was not of the type Congress contemplated to be covered by the Rehabilitation Act. Treatment decisions, as in *Bowen*, and limitation policies resulting in disparate impact discrimination, as in *Alexander*, when applied to the handicapped, require a different analysis of the Act than does a question of a handicap itself, as in *Arline*. *See Bowen*, 476 U.S. at 623 (citing United States v. University Hosp., 729 F.2d 144, 161 (1984)) ("[C]ongress never contemplated that section 504 of the Rehabilitation Act would apply to treatment decisions involving defective newborn infants when the statute was enacted . . . or at any subsequent time."); *Alexander*, 469 U.S. at 298-99 ("[T]here is reason to question whether Congress intended § 504 to embrace all claims of disparate-impact discrimination.").

228. 469 U.S. at 302-03.

229. "This Court has noted the remedial nature of the Rehabilitation Act and held that its provisions are to be accorded a broad construction in order to effectuate its purpose." Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 624 (1984) (citation omitted) (unanimous decision).

230. 451 U.S. 1 (1981).

the nature of a contract."[231] The "contract" is a *quid pro quo* relationship conditioning receipt of federal funding on state support of handicap employment, which is based on the recipient "knowingly accept[ing] the terms of the exchange."[232] Taking this element of the dissent's theory to its logical conclusion, since Congress failed to include any list of impairments, nothing amounts to a handicap under the Act, and no protection can result. The dissent's "contract" theory might work if the Act specifically listed those conditions that would constitute "handicapped." However, Congress never included such a list of impairments in the statute, and the HEW regulations implementing section 504 state that it was excluded "because of the difficulty of ensuring the comprehensiveness of any such list."[233] The dissent overlooks the fact that the terms of the Rehabilitation Act are broad, and that Congress spoke "with a clear voice" when it refused to limit the definition of handicapped in this way. It is clear from those conditions already considered as handicaps by judicial interpretation under the Act, and from the language defining "physical impairment"[234] and "major life activities,"[235] that recipients could make reasonable judgments as to impairments that might render one handicapped for purposes of the Act's protection.

Nonetheless, the application of a "contract" theory could have inconsistent, if not alarming, effects if a court, for example, looked to the intent of the parties in defining "handicapped individual" instead of the legislation governing such terms. A "meeting of the minds," instead of legislative intent, might be the standard used since Congress did not specifically list conditions within the four corners of the "contract." Yet, it is unreasonable to conclude that Congress desired, or ever contemplated, this result. The Act was not written as a contract, but as an antidiscrimination measure by the nation's leading employer and funder. It is doubtful that the federal government would see fit to allow discriminatory practices in certain programs and activities just because they were not federally funded. Thus, Congress spoke as unambiguously as possible by limiting relief under section 504 to those "handicapped" and "otherwise qualified," while still maintaining a broad scope of application for the Act necessary to protect handicapped individuals suffering from a wide range of discriminatory practices.

The majority opinion dealt with the dissent's "contract" theory in two ways. First, the Court noted that such a theory ignores the plain language of the Act, along with its implementing procedures. Second, the statutory provision that the dissent bases its argument on, taken from *Pennhurst*, was held to be "simply a general statement of 'findings' "

231. *Arline III*, 107 S. Ct. at 1132 (citing *Pennhurst*, 451 U.S. at 17) (Rehnquist, J., dissenting).

232. *Id.* (citing United States Dep't. of Transp. v. Paralyzed Veterans, 477 U.S. 597, 605 (1986); Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633, n.13 (1984); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

233. 45 C.F.R. § 84 app. 310 (1986)).

234. *See supra* note 178.

235. *See supra* note 179.

which only presented a preference by Congress in treatment of certain situations, a "stark" contrast to section 504's anti-discrimination order.[236] Both of these rebuttals are well founded, for they use basic canons of judicial reasoning and reveal the dissent's struggle. The first response goes to the core of statutory interpretation: "the starting point of any inquiry into the application of a statute is the language of the statute itself."[237] The second rebuttal attacks the dissent's "buckshot" approach in *Arline* when applying past decisions to present fact patterns. By emphasizing the express distinctions, and not the dissent's implicit similarities between *Arline* and section 504 cases previously decided by the Court, the majority was able to weave the law and Congress' intent for broad application with the facts in the present case to produce a pattern that seemed tailored to stymie discrimination against the handicapped. The Court, though, failed to provide a case of clear precedential value for future similar situations concerning other communicable diseases, such as AIDS.

C. *The Effects of* Arline*: Doing So Much, Yet So Little*

The majority sensed the necessity to address the ramifications that *Arline* would have on AIDS discrimination cases brought under the Rehabilitation Act. When it granted certiorari to a discrimination action involving a communicable disease, the Court must have realized that the opinion stemming from such a decision would have great precedential value for the rest of the judiciary, both federal and state alike. Yet, the majority specifically entertained the questions involving AIDS with a mere footnote,[238] and "skirted" the issue of whether a carrier of AIDS would be protected under the Rehabilitation Act as a "handicapped individual."

The responsibility that accompanies the Supreme Court's authority of final judicial review should entail guidance in the determination of questions pressing the Nation's courts. This responsibility is especially significant when the opportunity for such timely direction is present in one of the few cases involving the Rehabilitation Act that reaches the Court's docket.[239] Yet, the Supreme Court, like any other federal or state court, is not required to pass upon issues which are not present in a case. It is possible, however, for a law-moving decision to find its impetus in those areas left to silence.

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236. *Arline III*, 107 S Ct. at 1130 n.15.

237. Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979).

238. The footnote reads:

> This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.

Arline III, 107 S. Ct. at 1128 n.7. *See generally* District 27 Community School v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986) (for discussion of HTLV III/LAV, the transmitted AIDS virus, and AIDS Related Virus (ARV)).

239. *See District 27 Comm. School*, 130 Misc. 2d at 402, 502 N.Y.S.2d at 329; *see also, e.g.*, Storar v. Storar, 52 N.Y.2d 363, 369-70, 420 N.E.2d 64, 66-67, 438 N.Y.S.2d 266, 268-69 (N.Y. App. 1981).

In *Arline*, the Court was silent on the issue of whether a carrier of AIDS, who suffers no physical impairment, is handicapped under the Rehabilitation Act. It simply noted its refusal to expand the holding, and left this issue for the rest of the judiciary to struggle with. By doing so, the Court left the question open to more litigation; but, was expanded litigation truly the majority's intent?

The majority points out amendments extending the Act's coverage to those " 'regarded as having' a physical or mental impairment" which thereby limits a major life activity.[240] They specifically noted that an impairment limiting an individual's ability to work was within these guidelines.[241] Considering these facts, many people could regard those that are asymptomatic carriers of AIDS as impaired, based on uninformed assumptions and unfounded apprehension of contagiousness. In discussing the fears and myths associated with contagiousness, the majority reiterated its belief that interpretation of the definition "handicapped" should be broad, and emphasis should be placed on the additional requirement of being "otherwise qualified" for paramount consideration for protection under the Act.[242] Following this line of reason, discrimination in the work place against an asymptomatic carrier would amount to discrimination against a handicapped individual, and case-by-case analysis as to qualification could determine if protection by the Act was applicable.[243]

Recent evidence has pointed to the possibility of a causal connection between tuberculosis and the HIV virus associated with AIDS.[244] Reports based in New York City have interpreted the concurrent rise of tuberculosis morbidity and cases of immunodeficiency caused by HIV infection in males 20 to 49 years old as related,[245] and have also associated asymptomatics infected with the HIV virus with the increase in tuberculosis. If this latter conclusion was found to be accurate, those persons who are asymptomatic carriers of AIDS and who develop tuberculosis would have manifested a physical impairment affecting their respiratory system and would, no doubt, under the holding in *Arline*, be considered handicapped.[246]

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240. *Arline III*, 107 S. Ct. at 1128.

241. *Id.* at 1129 n.10. Justice Brennan pointed to Congress' intention that "the primary goal of the Act is to increase employment of the handicapped." *Id.* (citing Consolidated Rail Corp. v. Darrone, 465 U.S. 633 n.13 (1984)).

242. *Id.* at 1129-30.

243. *See* Kohl v. Woodhaven Learning Center, 676 F. Supp. 945, 948 (W.D. Mo. 1987) (the district court, in finding that carrier of Hepatitis B was "handicapped" under section 504, concluded that their decision was consistent with the Supreme Court reasoning in *Arline*); *see also District 27 Comm. School*, 130 Misc. 2d at 418-19, 502 N.Y.S.2d at 326-27 ("Exclusive reliance and underlying data furnished by physician and parent of child infected with HTLV-III/LAV is not appropriate for purposes of proposed case-by-case review . . . .").

244. *See* 36 MORBIDITY & MORTALITY WEEKLY REPORTS 786-90 (December 11, 1987).

245. *Id.* at 787.

246. The report mentions two possibilities in which the immuno-deficiency may escalate the risk of tuberculosis. There is a likelihood that susceptibility to new infection, created by the immuno-deficiency, could allow for a rapid spread of the tuberculosis. Another possibility, the one believed to be most prevalent, is that the tuberculosis infec-

There is little doubt that a claimant who *suffers* from either AIDS or AIDS related complex ("ARC") would be protected as a handicapped individual under the Act. The issues in the *Arline* case revolved around an individual who suffered from a disease which manifested a physical impairment *and* contagiousness, and such conditions are also found in those with AIDS or ARC.[247] The Court, in determining the *Arline* case by statutory interpretation, inquired into the application of the Rehabilitation Act by applying "the language of the statute itself" to the facts.[248] In the definitions promulgated for the Act, "physical impairment" means "any physiological disorder or condition . . . *affecting* one or more of the following body systems . . . neurological; musculoskeletal; special sense organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine."[249] The "major life activities" affected by this impairment are "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[250] The symptomatic sufferer of AIDS is plagued by a "physiological disorder" that, because of its effects on the individual's immune system, affects all body systems, thereby limiting many of the activities engaged in each day.

In a recent New York case, *District 27 Community School v. Board of Education*, the issue of whether a sufferer of AIDS was handicapped was considered by applying, in a like fashion to the Supreme Court in *Arline*, the language of the Rehabilitation Act.[251] This was an action brought by certain school board members who questioned a school board policy that children with AIDS, or those suspected of having AIDS, were not automatically excluded from public schools, but reviewed on a case-by-case basis.[252] The New York Supreme Court held that the children with AIDS were handicapped under the Act, and their automatic exclusion would be a violation of their rights under the Rehabilitation Act.[253] The

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tion was latent in the system, and the immuno-deficiency allowed it to develop into the manifested disease. *Id.* at 789.

247. Acquired immunodeficiency syndrome ("AIDS") is basically the manifestation of a disease linked to a defect in a host's cell-mediated immunity, brought on by human T lymphotropic virus type III ("HTLV III") or lymphadenopathy-associated virus ("LAV"). *See* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1392-93 (11th ed. 1987). HTLV III/LAV infection results in a broad range of clinical illnesses, from secondary complications of the specific immune defect to fever, weight loss, diarrhea, fatigue, night sweats, lymphadenopathy, and immunologic abnormalities. The latter group represents the symptoms associated with AIDS related complex ("ARC"), suffered by symptomatic carriers of HTLV III/LAV whose condition does not meet the requirements for full-blown AIDS. *Id.* at 1394.

248. United States Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597, 604 (1986); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520 (1984).

249. 45 C.F.R. § 84.3(j)(2)(i) (1986) (emphasis added); 29 C.F.R. § 1613.702(b) (1986).

250. 45 C.F.R. § 84.3(j)(2)(ii) (1986).

251. *District 27 Community School*, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986).

252. *Id.* at 417, 502 N.Y.S.2d at 339. The court concluded that outside expertise, such as public health personnel, should assist in the determination of what risks are presented by allowing the contagious individual to remain in school. *Id.*

253. *Id.* at 414-15, 502 N.Y.S.2d at 336-37.

court used the same strict application of the language of the Act to an individual suffering from AIDS as the Supreme Court applied to an individual suffering from tuberculosis in *Arline*. The New York court concluded that the HTLV-III/LAV virus creates a physical impairment of the hemic and lymphatic body systems when it destroys certain lymphocytes.[254] The court also determined that the children suffering from AIDS would be "treated . . . as having such an impairment" if they were automatically excluded from the classroom.[255] An "otherwise qualified" determination must first be made as to whether the risks present in each case require exclusion.[256] This case, although decided by a state supreme court, reveals the ease with which lower courts could apply interpretations similar to those of the Supreme Court in *Arline*.[257] Additionally, it shows that inclusion of communicable diseases as handicaps within the Act provides a realistic and workable solution for discrimination based on the real or perceived fears associated with these conditions.

V. CONCLUSION

Laws prohibiting discrimination against the handicapped must be interpreted broadly by the courts—the language of the legislation, the variety of disabilities that give rise to handicaps, the diversity of areas where such discrimination is found, and the problems caused by the long-standing prejudices that make living, at times, difficult for the handicapped demand it. The Supreme Court decision in *School Board of Nassau County v. Arline* extended the area of conditions that the Rehabilitation Act may include, but it did not expand or contract the scope of qualifications necessary for coverage. Instead, *Arline* only maintained the Act's application within "manageable" bounds.

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254. *Id.* at 414, 502 N.Y.S.2d at 336.

255. *Id.*

256. *Id.* The means of transmission of AIDS, critical in determining the risks of infection, are much like those of a carrier of the hepatitis B virus, the condition dealt with in New York State Assoc. for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979). The HTLV-III/LAV retroviral agent of AIDS, though, is a fragile virus that has a lower order of infectivity than the hepatitis B virus. *District 27 Comm. School*, 130 Misc. 2d at 405, 502 N.Y.S.2d at 330.

257. *See also* Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Ca. 1987) (employee terminated from job because AIDS is considered "handicapped" under section 504 of the Rehabilitation Act).

ADDENDUM

Since the writing of the *Arline* article, at least one federal district court has ruled on whether an asymptomatic carrier of the AIDS virus is covered by the Rehabilitation Act. In *Doe v. Centinela Hospital*, No. CV 87-2514 (C.D. Cal. June 30, 1988), the District Court for the Central District of California held that the asymptomatic carrier, infected with the human immunodeficiency virus ("HIV"), could not be excluded from a hospital's residential drug and alcohol treatment program because of the fear of contagion. The court's ruling on the motion for summary judgment stated that, under the *Arline* decision, the fear of contagion constituted a handicapped condition under the Rehabilitation Act. The issues of whether the carrier was "otherwise qualified" and excluded solely because of his handicap must be decided by a trial.